

## CHAPTER 94F.

### COMPLEMENTARY PROVISIONS CONCERNING TOBACCO PRODUCT MANUFACTURERS

Section 1. As used in this chapter, the following words shall have the following meanings:

"Brand family", all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors including, but not limited to, "menthol", "lights", "kings" and "100s", and includes any use of a brand name, alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.

"Cigarette", as defined in chapter 94E.

"Commissioner", the commissioner of revenue or the commissioner's duly authorized representative.

"Nonparticipating manufacturer", a tobacco product manufacturer that is not a participating manufacturer.

"Master Settlement Agreement", as defined in chapter 94E.

"Participating manufacturer", as defined in section II (jj) of the Master Settlement Agreement and any amendments thereto.

"Qualified Escrow Fund", as defined in chapter 94E.

"Stamper", a person authorized by the commissioner to affix the excise stamp on packages or other containers of cigarettes pursuant to chapter 64C.

"Tobacco product manufacturer", as defined in chapter 94E.

"Units sold", as defined in chapter 94E.

Section 2. (a) A tobacco product manufacturer whose cigarettes are sold in the commonwealth, whether directly or through a wholesaler, retailer or similar intermediary, shall annually execute and deliver to the attorney general and to the commissioner, not later than April 30, in a form and manner prescribed by the attorney general, a certification under penalty of perjury that as of the date of the certification, the tobacco product manufacturer either: (1) is a participating manufacturer; or (2) is in full compliance with the escrow requirements of chapter 94E, including any installment payments which may be required under subsection (e) of section 4.

(b) A participating manufacturer shall include in its certification a complete list of all of its brand families. The participating manufacturer shall update such list 30 days prior to any addition or modification to its brand families by executing and delivering a supplemental certification to the attorney general and the commissioner.

(c) A nonparticipating manufacturer shall include in its certification a complete list of all of its brand families, with: (i) for each brand family, the number of units sold in the commonwealth during the preceding calendar year; (ii) a designation of all of the brand families that have been sold in the commonwealth at any time during the current calendar year; (iii) a designation of all of the brand families sold in the commonwealth during the preceding calendar year that no longer are being sold in the commonwealth as of the date of the certification; and (iv) the identification, by name and address, of any other manufacturer of such brand families in the preceding calendar year or current calendar year. The nonparticipating manufacturer shall update the list 30 days prior to any addition or modification to its brand families by executing and delivering a supplemental certification to the attorney general and the commissioner.

(d) In the case of a nonparticipating manufacturer, such certification shall further certify:

(i) that the nonparticipating manufacturer is registered to do business in the commonwealth or has appointed an agent for service of process and provided notice thereof as required by section 3; (ii) that the nonparticipating manufacturer maintains a qualified escrow fund established under and governed by a qualified escrow agreement that has been reviewed and approved by the attorney general; (iii) that the nonparticipating manufacturer is in full compliance with chapter 94E and this chapter and any regulations promulgated pursuant thereto; and (iv) the name, address and telephone number of the financial institution where the nonparticipating manufacturer has established such qualified escrow fund; the account number of such qualified escrow fund and the subaccount number for the commonwealth; the amount such nonparticipating manufacturer placed in such fund for units sold in the commonwealth during the preceding calendar year; the date and amount of each such deposit and such evidence or verification as may be deemed necessary by the attorney general to confirm them; and the dates and amounts of all withdrawals or transfers of funds made at any time from such qualified escrow fund or from any other qualified escrow fund into which the nonparticipating manufacturer ever made escrow payments pursuant to said chapter 94E or this chapter and any regulations promulgated pursuant thereto.

(e) A tobacco product manufacturer may not include a brand family in its certification unless: (i) in the case of a participating manufacturer, the participating manufacturer affirms that the brand family is deemed to be its cigarettes for purposes of calculating its payments under the Master Settlement Agreement for the relevant year, in the volume and shares determined pursuant to the Master Settlement Agreement; and (ii) in the case of a nonparticipating

manufacturer, said nonparticipating manufacturer affirms that the brand family is deemed to be its cigarettes for purposes of chapter 94E. Nothing in this section shall be construed to limit or otherwise affect the commonwealth's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for the purposes of calculating payments under the Master Settlement Agreement or for the purposes of said chapter 94E.

(f) The tobacco product manufacturer shall maintain all invoices and documentation of sales and other such information relied upon for such certification for a period of 5 years, unless otherwise required by law to maintain them for a greater period of time.

(g) In consultation with the attorney general, the commissioner shall develop a public directory listing all tobacco product manufacturers who have provided certifications conforming to the requirements of subsection (a) and all brand families that are listed in such certifications, subject to the following:

(1) The commissioner shall not include in the directory the name or brand families of a nonparticipating manufacturer that fails to provide the required certification or whose certification the attorney general determines is not complete and accurate and otherwise in compliance with subsections (a) to (f), inclusive unless such violation has been corrected to the satisfaction of the attorney general.

(2) The commissioner shall not include in the directory the name or brand families of a nonparticipating manufacturer if the attorney general determines that: (i) all escrow payments required pursuant to chapter 94E for any period for a brand family, whether or not listed by the nonparticipating manufacturer, have not been fully paid into a qualified escrow fund governed by a qualified escrow agreement approved by the attorney general; or (ii) all

outstanding final judgments, including interest thereon, for violations of said chapter 94E or this chapter have not been fully satisfied for such brand family and such manufacturer.

(3) The commissioner shall take reasonable steps to update the directory as necessary in order to keep the directory in conformity with the requirements of this chapter.

(4) Every stamper shall provide to the commissioner, and update as necessary, an electronic mail address for the purpose of receiving any notices as may be made pursuant to this chapter.

(h) No person shall: (1) affix an excise stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory; or (2) sell, offer or possess for sale in the commonwealth, cigarettes of a tobacco product manufacturer or brand family not included in the directory.

Section 3. (a) A nonresident or foreign nonparticipating manufacturer who has not registered to do business in the commonwealth as a foreign corporation or business entity shall, as a condition precedent to having its brand families listed or retained in the directory, appoint and continually engage, without interruption, the services of an agent in the commonwealth to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of chapter 94E and this chapter, may be served in any manner authorized by law. Such service shall constitute legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, phone number and proof of the appointment and availability of such agent to, and to the satisfaction of, the attorney general.

(b) In the event that a nonparticipating manufacturer terminates the authority of an agent,

the nonparticipating manufacturer shall provide notice to the attorney general 30 calendar days before the termination and shall provide proof to the satisfaction of the attorney general of the appointment of a new agent not less than 5 calendar days before the termination of the existing agent appointment. In the event that an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the attorney general of the termination within 5 calendar days and shall include proof to the satisfaction of the attorney general of the appointment of a new agent.

(c) A nonparticipating manufacturer whose products are sold in the commonwealth, without appointing or designating an agent as required in this section, shall be deemed to have appointed the state secretary as such agent and may be proceeded against in courts of the commonwealth by service of process upon said state secretary. The appointment of the state secretary as such agent shall not satisfy the condition precedent under section 2 to having the brand families of the nonparticipating manufacturer listed in the directory.

Section 4. (a) Not later than 20 days after the end of each calendar quarter, and more frequently if so directed by the commissioner, each stamper shall submit such information as the commissioner requires to facilitate compliance with this chapter. The stamper shall maintain and make available to the commissioner and the attorney general all invoices and documentation of sales of all nonparticipating manufacturer of cigarettes and any other information relied upon in reporting to the commissioner for a period of 5 years.

(b) The commissioner may disclose to the attorney general any information received under this chapter and requested by the attorney general for purposes of determining compliance with and enforcing the provisions of this chapter and chapter 94E. The commissioner and the

attorney general may share information received under this chapter and chapter 94E with each other and with other federal, state and local agencies for purposes of enforcement of this chapter, chapter 94E and the corresponding laws of other states.

(c) The attorney general may require from the nonparticipating manufacturer or from the financial institution at which the nonparticipating manufacturer has established a qualified escrow fund for the purpose of compliance with chapter 94E, information and documents relating to such fund, including proof of the amount of money in the fund, exclusive of interest, and the dates and amounts of deposits and withdrawals.

(d) In addition to such other information as may be required, the commissioner and the attorney general may require a stamper or tobacco product manufacturer to submit information including, but not limited to, samples of the packaging and labeling of each brand family, as may be necessary to enable the commissioner and the attorney general to determine whether a stamper or a tobacco product manufacturer is in compliance with this chapter and chapter 94E.

(e) To promote compliance with this chapter and chapter 94E, the commissioner may promulgate regulations requiring a tobacco product manufacturer subject to the requirements of subsection (c) of section 2 to make the required escrow deposit in quarterly installments. The commissioner and the attorney general may require production of information sufficient to enable the commissioner and the attorney general to determine the adequacy of the amount of the installment deposit.

Section 5. (a) No person shall: (i) sell or distribute cigarettes in violation of subsection (h) of section 2; or (ii) acquire, hold, own, possess, transport, import or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the

commonwealth in violation of said subsection (h). A violation of this section shall be punished by a fine of not more than \$1,000 or by imprisonment in a house of correction for not more than 1 year, or both.

(b) In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a stamper has violated subsection (h) of section 2 or any regulation adopted pursuant to said subsection (c) of section 6, the commissioner may revoke or suspend the stamping authority of the stamper in the manner provided in chapter 62C or chapter 64C. Each stamp affixed and each sale or offer to sell cigarettes in violation of said subsection (h) of said section 2 shall constitute a separate violation. The commissioner may also impose a civil penalty in an amount not to exceed the greater of 500 per cent of the retail value of the cigarettes sold or \$5,000 for each violation.

(c) Any cigarettes that have been sold, offered for sale or possessed for sale in the commonwealth in violation of subsection (h) of section 2 shall be deemed contraband, and such cigarettes shall be subject to seizure and forfeiture. All cigarettes so seized and forfeited shall be destroyed and not resold.

(d) The attorney general, on behalf of the commissioner, may seek an injunction to restrain a threatened or actual violation of this chapter and to compel compliance with its terms.

(e) If a court determines that a person has violated this chapter, the court shall order any profits, gains, gross receipts or other benefits from the violation to be disgorged and paid to commonwealth.

(f) In any civil action brought to enforce this chapter or chapter 94E, the commonwealth shall be entitled to recover the costs of investigation and the costs of the action, including



reasonable attorney fees and expert witness fees.

(g) A person who violates subsection (h) of section 2 shall be deemed to have engaged in an unfair and deceptive trade practice in violation of chapter 93A.

(h) Unless otherwise expressly provided, the remedies and penalties provided by this chapter are cumulative to each other and to remedies or penalties otherwise available.

Section 6. (a) A determination of the commissioner to not list or to remove from the directory a brand family or tobacco product manufacturer shall be subject to review in the manner prescribed in section 4 of chapter 249.

(b) The commissioner shall not grant or renew stamping authority to a person unless the person has certified to the commissioner, in writing, that he is knowledgeable of this chapter and shall comply with its terms.

(c) The commissioner and the attorney general may promulgate regulations necessary to effectuate the purposes of this chapter.

(d) This chapter is not intended to and shall not be deemed to amend chapter 94E. If a court of competent jurisdiction finds that a provision of this chapter is in conflict with a provision of said chapter 94E, then the provision of said chapter 94E shall control and the provision of this chapter shall not apply. If any part of this chapter would cause chapter 94E to no longer constitute a "model statute" or a "qualifying statute," as those terms are defined in the Master Settlement Agreement, then that part of this chapter shall not apply.